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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,
Respondents

V.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Certiorari Filed January 21, 1980
Certiorari Granted April 14, 1980

APPENDIX TO BRIEF ON THE MERITS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 78-2917 & 78-2865

THE UNITED STATES OF AMERICA, and
THE CROW TRIBE OF INDIANS,

Appellants,

—vs—

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, *et al.,*

Appellees.

Appeal from the United States District Court
For the Distrrict of Montana
Billings Division
The Honorable James F. Battin

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FACTS

The Crow Tribe is not indigenous to Montana or Wyoming. Tribal roots were formed in Canada near the Winnipeg Lake area. They migrated into the area they now occupy in approximately 1700.[9]

There was no pact or treaty between the Crow and other tribes who occupied the Crow territory before that tribe's migration. Crow occupancy was not based upon aboriginal title "from time immemorial."[10]

Almost from the inception of their occupation, the Crow were beseiged from all sides by other warring tribes: The Flatheads and Pend d'Oreilles to the north, the Blackfoot to the north and east, and the Sioux to the east. While the Sioux, a numerically stronger tribe, never did gain permanent possession of the Crow territory, "There is little doubt that eventually they would have done so but for the interposition of governmental authority."[11]

Although the Crow did not have a written language, it did have an extensive vocabulary. The tribe had words for hunting, fishing, elk, deer, trout, and other fish. They also differentiated in their vocabulary between a "right" and a "privilege."[12]

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[9] *The North American Indian,* Edward S. Curtis, Johnson Reprint Corporation, 1909, page 38; testimony of Joe Medicine Crow, tribal historian. Tr., p. 106.

[10] Tr., pp. 150-151, 152.

[11] Op. cit., at p. 40; testimony of Joe Medicine Crow acknowleges population supremacy of the Sioux. Tr., p. 152. The population of the Tribe in 1868 was 4,000 to 5,000. Tr., p. 153.

[12] Op cit.; tr., pp. 100-102, 133-144.

The Crow largely depended upon big game animals or agriculture for subsistence.[13] The first *written* reference to fishing and hunting by the Crow was the result of a council meeting between the Crow Tribe and the Federal Government in May of 1873, which ultimately resulted in a cession of a portion of the reservation in 1882.[14] Testimony and documentary evidence support the lower court's conclusion that fish were not part of the Crow diet.[15] There was no evidence presented that the Tribe depended upon canoes or any type of boat for transportation on the Big Horn River, the Yellowstone, or the other rivers and streams which flowed through their country.

The United States commenced treating with the Crow Tribe in 1825,[16] but that treaty made no reservation of any land.

The next treaty, dated September 17, 1851, created a Crow Reservation[17] of some 38,531,174 acres.[18] Article 5 in part provided that the Indian

[13] The Crow were "a nomadic big-game hunting tribe," centered around the buffalo. Tr., p. 108.

[14] Act of April 11, 1882, 22 Stat. 42; Tr., p. 109; C.T. Ex. 74. At page 506, Blackfoot speaking for the Tribe said: "On this side of the river and on the other side is our country." Ownership of the bed of the river was never specifically addressed, but it is evident that the Indian felt he had no proprietary interest in it.

[15] Masters thesis published by Joe Medicine Crow, May, 1939: "(F)ishing was a dull way of obtaining food according to the Crow." Tr., p. 160; Tr., pp. 207-208; Tr., pp. 219-220; Tr., p. 238; Tr., p. 246; letter of July 31, 1919, U.S. Ex. 10; letter of February 27, 1920, U.S. Ex. 16; Letter of June 2, 1921, U.S. Ex. 19; letter of December 5, 1921, U.S. Ex. 21; letter of February 24, 1922, U.S. Ex. 24.

[16] August 4, 1825, 7 Stat. 266.

[17] *The Crow Nation* v. *United States, supra;* Treaty of Fort Laramie, II Stat. 749; *The Crow Nation* v. *United States,* 81 Ct.Cl. 238, 248 (1935).

[18] *Id.*, at p. 247.

nations "do not surrender the *privilege* of hunting, fishing, or passing over any of the tracts of country heretofore described." (Emphasis supplied.)

On April 30, 1868, W. J. Cullen, Special Agent for Montana was instructed to negotiate treaties with, *inter alia*, the Crow and to effect "their location upon suitable reservation with means to enable them to engage in *agricultural* and other *pursuits*."[19]

On May 7, 1868, the Second Treaty of Fort Laramie was signed and proclaimed by the President on August 12, 1868.[20] The treaty left a reservation to the Crow of approximately 8,000,000 acres and resulted in a cession to the United States of something over 30,000,000 acres.[21] Subsequent acts further reduced the size of the reservation.[22]

Article 1 of the Treaty of 1868 provided, *inter alia*:

> "IF BAD MEN AMONG THE WHITES OR AMONG OTHER PEOPLE, SUBJECT TO THE AUTHORITY OF *THE* United *States*, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> "If bad men among the Indians shall commit a

[19] *Id.*, at p. 250; emphasis supplied.

[20] 15 Stat. 649.

[21] *United States* v. *Finch*, 548 F.2d 822, 827 (9th Cir., 1976).

[22] 22 Stat 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937).

wrong or deprivation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, and proof made to their agent and noticed by him, deliver up the wrong doer to the United States, to be tried and *punished* according to its *laws*;* * *." (Emphasis supplied.)

Article 2 described the reservation which would be "set apart for the absolute and undisturbed use and occupation of the Indians." The only mention of hunting or fishing rights is contained in Article 4 which provided the Indians "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."

Although Article 2 of the Treaty of 1868 provided that:

> "No persons, except those herein designated and authorized so to do, and except such officers, agents, and employee's of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, setttle upon, or reside in the territory described in this article for the use of said Indians, and henceforth, they will, and do hereby, relinquish all title, claim or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid,"

the General Allotment Act of 1887[23] and the Crow Allotment Act of 1920[24] specifically provided that

[23] Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. Section 331, *et seq.*

[24] Act of June 4, 1920, 41 Stat. 751.

patents in fee could be issued by the United States to allottees within the Crow Indian Reservation and thus be subject to alienation to non-Indians.[25]

The Treaty was obviously intended to assist the Indians in establishing an agrarian society.[26]

Article 5 of the treaty provided that an Indian agent would reside among the Crow Tribe to inquire:

> "into such matters of complaint, *by and against the Indians*, as may be presented for investigation under the provisions of their treaty stipulations, and also for the faithful discharge of other duties enjoined on him by the law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty." (Emphasis supplied.)

The allotment system was initially unilaterally imposed upon the Crow by statute and was designed to

[25] The Acts of April 11, 1882, 22 Stat. 42; March 3, 1891, 26 Stat. 989; February 12, 1889, 25 Stat. 660; March 1, 1893, 27 Stat. 529; June 4, 1888, 25 Stat. 167; March 3, 1887, 24 Stat. 545; April 27, 1904, 33 Stat. 352; May 25, 1918, 40 Stat. 461; June 4, 1920, 41 Stat. 751; April 14, 1926, 44 Stat. 251; April 14, 1928, 45 Stat. 429; August 31, 1937, 50 Stat. 884; July 15, 1958, P. L. 85-523, not only diminished the reservation but also encroached markedly upon exclusivity within that reservation. For example, railroads were authorized; public schools under Montana jurisdiction were granted lands for "public school purposes"; the State of Montana was granted sections 16 and 36 within the reservation; public roads were financed, "provided Big Horn County participated"; Custer Battlefield and other lands were conveyed to the United States; and Yellowtail Dam Site was "taken," despite Section 10 of the Allotment Act of 1920. Each of the above acts clearly violated express provisions of the Treaty of 1868. See *Lone Wolf* v. *Hitchcock*. 197 U.S. 533 (1903): and cf. *Confederated Salish & Kootenai Tribes* v. *United States*, 437 F.2d 458 (Ct.Cl., 1971).

[26] Articles 3,6,8,9, and 10.

integrate the Indian into white communities and, by close association with his white brother, to ultimately lead to an amalgamated or homogenized society.[27]

The Crow Allotment Act of 1920 had a similar purpose but was actively supported by the Tribe.[28] The allotment philosophy, of course, was terminated

[27] See concurring opinion of Justice Washington, *Worchester* v. *Georgia*, 31 U.S. (6 Pet. 515), 105 S.Ct. at 271 (1832); Cohen, *Handbook of Federal Indian Law*, 1942, pages 208-210; *Quinault Allottee Association* v. *United States*, 45 F.2d 1391, 1396-1397 (Ct.Cl. 1973), cert.den. 416 U.S. 961.

[28] "This bill contemplates the allotment among the members of the Crow Tribe of the unallotted lands within their reservation in the State of Montana, save a limited area too rocky and mountainous for cultivation, *and the distribution among them of the common property of the Tribe. It is in accordance with the policy to which Congress gave its adherence many years ago, and which found expression in the Dawes Act, approved February 8, 1887.* The commission as a result of whose work that act was passed, reported that the Crows numbered about 3,500. The Tribe has since dwindled to 1,710, as shown by the last report of the Commissioner of Indian Affairs, a fact which constitutes eloquent but tragic confirmation of the view expressed by the Commission that the *communistc* tribal system ought, in, the interest of the *Indians, to be abandoned* as speedily as *possible.*

"In its general features and in almost every detail, this bill has the approval of the Indian Bureau and of the Indians, to their regularly constituted representatives, who attended the hearings conducted by the committee and who rendered very substantial aid in the preparation and perfection of the bill.

"Under previous acts of Congress, allotments were made to heads of families of 320 acres and to others of 260 acres. This process of equalizing allotments will first be made until each Indian shall have received 320 acres of land. Thereafter, the remaining lands are to be divided equally among the members of the tribe, so that each will become the owner of approximately 1,000 acres of land. Out of this each will be required to select a homestead of 320 acres, which is to be inalienable for 25 years. The remainder may be sold by the Indian owner, but only with the approbation of the Secretary of Interior in case of incompetent Indians." Senate Report No. 219, 66th Congress, 1st Session.

to a large extent by the Indian Reorganization Act of 1934.[29] The allotment philosophy is part of the historical backdrop against which the issues in this case must be decided.

[28] Continued:

Congressman Riddick, one of the authors of the Crow Allotment Act of 1920, in urging its passage, stated:

"Of the 1,000 or more acres that will be allotted to each Indian, there is a provision that 320 acres of his land shall not be sold for a period of 25 years. With the additional money that will go to these Indians from the rental or sale of their surplus lands, all competent Indians may undertake the managment of their own affairs under the most favorable circumstances. ***

"Section 1 indicates what lands shall be allotted and the procedure of making the division. About 4000,000 acres of mountainous grazing land is reserved from allotment for grazing land for the tribal herd, the balance *is* all to be *allotted.*" 66th Congress, 2nd Session, April 22, 1920, Congressional Record, 1920, p. 6493.

Commenting further, Congressman Riddick quoted from Frank Yarlott, an Indian who spoke for the Tribe, as follows:

"As the bill now stands, it has the unqualified endorsement of the entire tribe.

"To the educated Indians who have closely watched events this seems the best solution to the long vexed "Indian problem." This means the gradual influx of white *settlers* with whom the Indians will become acquainted and *gradually* absorb their methods of farming and cattle raising. *They* will come to understand the white temperament *gradually* and be *friends.*

" 'It is the hope and desire of the Indians that their white friends will support this bill, as there was perfect harmony between the Indian Committee, the Office of Indian Affairs, and the Crow Delegation. They are also anxious for the development of the reservation and believe this plan is best for all concerned.' " *Id.*, at p. 6494. (Emphasis supplied.)

[29] See U.S.C. Section 461, *et seq.*

B. *History of Acquisition by the United States and the State of Montana of Crow Territory.*

The first non-Indian sovereign which claimed the territory which now encompasses the Crow Indian Reservation was Spain under the Treaty of Tordesillas, which was concluded in 1494 between Spain and Portugal. At the time this treaty was signed, the Crow had not migrated into the reservation area. By that treaty, Spain received all lands west and south of an imaginary line drawn 370 leagues west of the Cape Verde Islands.[30]

By the Treaty of San Ildefonso of October 1, 1880, Spain ceded what was then referred to as the Louisiana Territory back to France.[31]

The United States obtained title to the Louisiana Territory in 1803 by virtue of the Louisiana Treaty.[32] Paragraph 3 of that treaty guaranteed:

> "The inhabitants of the ceded territory shall be incorporated in the United of the United States, *and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages and immunities of citizens of the United States; and in mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.*" (Emphasis supplied.)

[30] Samuel Flag Bemis, *A Diplomatic History of the United States,* p. 4 (N.Y., 1953); see also Appraisal Report Before the Indian Claims Commission, Docket No. 54, *The Crow Tribe of Indians* v. *The United States of America,* Norman B. Plummer, p. 27. (Appendix to Appellees' Proposed Findings of Fact and Conclusions of Law)

[31] Bemis, *supra,* at p. 128; Appraisal Report, *supra,* at p. 28.

[32] April 30, 1803, proclaimed October 21, 1803, 8 Stat. 200.

By the Act of March 3, 1811, 33 U.S.C. Section 10, Congress provided:

> "All the navigable rivers and waters in the former Territories of *Orleans and Louisiana shall be and forever remain public highways.*" (Emphasis supplied.)

Both our courts and Congress have recognized that the object of the Louisiana Treaty was "to be the formation of new states."[33]

The Nebraska Territory was created on May 30, 1854, and the Crow cession in the present State of Montana was included in the Dakota Territory which was carved out of the Nebraska Territory on March

[33] *United States* v. *Brewer-Elliott Oil & Gas Co.*, (D.C. Okla.) 249 F. 609, 612, aff'd 270 F. 100, aff'd 260 U.S. 77 (1922); 20 Congressional Record, House, 815:

"We see, upon examination, that the ordinance of 1787 and the Louisiana treaty have been successfully and repeatedly used as authority for the right of new States to be admitted to the Union. No better authority or language regarding the *duty of Congress to admit new states need be given* and the following from Chief Justice Taney in the Dred Scott case (19 How., 446):

" '*** There is certainly no power given by the Constitution to the Federal Government to establish and maintain colonies bordering on the United States, or at a distance, to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way except by the admission of new States. That power is plainly given, and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State and the Federal Government. *But no power is given to acquire a Territory to be acquired and held permanently in that character.*' " (Emphasis supplied.)

See also Senate Report No. 75, January 23, 1888 (U.S. Ex. 4-E at pp. 12-13); H.R. Report No. 1025, March 13, 1888 (U.S. Ex. 4-F).

2, 1861.[34] Subsequently, the Territory of Idaho was created from eastern Washington and western Dakota, which included all of the present State of Montana. On January 16, 1864, that territory established the future Montana counties of Missoula, Deer Lodge, Dawson, Beaverhead, Madison, Jefferson, Choteau, and Big Horn.[35]

"The mining boom of 1862 and 1863 led to the creation of the territory of Montana on May 26, 1864," and on December 12, 1864, the Territorial Assembly at Bannack immediately adopted "the counties created by the Idaho legislature* * *(with) the Crow cession* * *located in Gallatin, and Big Horn counties."[36]

Although Congress nullified these original acts, they were recreated by the legislature of 1867.[37] "Thus, on the date of the treaty (of May 7, 1868) the Crow cession in the territory of Montana was located in Big Horn, Gallatin, Meagher, and Muscleshell counties."[38]

Although the Organic Act[39] for the Territory of Montana provided:

> "[N]othing in this act contained shall be construed to impair the rights of persons or property now pertaining to the Indians in said territory so long as such rights remain unextinguished by

[34] Appraisal Report, *supra*, at p. 31.

[35] *Id.*, at p. 34.

[36] *Id.*, at p. 35.

[37] *ID.*, at p. 36.

[38] *Id.*, at P. 36.

[39] Act of May 26, 1864, 13 Stat. 85.

treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territory limits or jurisdiction of any state or territory; but all such territories shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed.[40]

The Enabling Act of Montana substantially changed the language of 1864:

> "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribe; *and that until the title thereto shall have been extinguished by the United States, the same shall be and remain* subject to the disposition of the UnitedStates, and said Indian lands shall remain under the ab-

[40] Unlike the treaties with the Choctaw and Cherokee Indians, the Treaty of 1868 contained no provision excluding reservations from future states. Compare Treaty of Dancing Rabbit Creek, September 27, 1930, F & G Ex. 67, and Treaty of New Echota, December 29, 1935, F & G Ex. 68, each of which do have such provisions.

solute jurisdiction and control of the Congress of the United States;* * *." (Emphasis supplied.)[41]

Section 10 provided that sections 16 and 36 would be granted the State upon admission to the Union, but that the same sections which were "embraced in Indian" reservations would not be subject to the indemnity provisions of the act, "until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain."[42] Section 16 of the Crow Allotment Act granted to the State of Montana for common school purposes section 16 and 36 for a total of 45,041.72 acres.[43] It has been agreed that 30.29 percent of the approximate 2.3 million acres within the reservation or approximately 700,000 acres is presently owned in fee by non-Indians.[44]

C. *Exercise of State Jurisdiction within the Reservation.*

While the Tribe and the United States attempted to show that the Tribe has continually exercised jurisdiction over hunting and fishing activities on the reservation, the weight of the evidence (and the

[41] Act of February 22, 1889, 25 Stat. 676.

[42] *Id.*, Section 10.

[43] *Federal and State Indian Reservations*, United States Department of Commerce, United States Government Printing Office, 1974, p. 271; in *Rosebud* v. *Kneip*, 430 U.S. 584, 599-600 (1977), this type of provision was seized upon as indicating congressional intent to disestablish a reservation.

[44] The United States continues to issue fee patents to members of the Crow Tribe within the Crow Indian Reservation, thus providing the legal basis by which reservation lands can be conveyed to non-tribal members. (United States supplementary answer to interrogatory no. 79, Record, p. 893.)

court so found, Record, pp. 1251, *et seq.)* clearly supports a conclusion that in matters of law enforcement involving non-Indians (and, on occasion, tribal members) within the reservation, the County Attorney of Big Horn County, located in the county seat of Hardin, a community just outside the exterior boundaries of the reservation, has exercised near exclusive jurisdiction in prosecuting non-members for offenses committed on fee lands within the confines of the reservation.[45] Montana Department of Fish and Game wardens patrolled the reservation and cited non-Indians for fish and game violations, whether or not those violations took place on tribal, trust, or fee lands. Throughout the period of time up to approximately 1973, there were no real confrontations regarding jurisdiction. While during that time, the Tribe did express some dissatisfaction with non-member hunting and fishing activity within the reservation, the Tribe, the Federal Government, and the State understood that:

(1) The State had exclusive jurisdiction over non-member hunting and fishing violations on fee patent lands;

(2) The Federal Government had concurrent jurisdiction over non-members fishing and hunting without permission on tribal or trust properties;

(3) The Tribe neither had not exercised any

[45] Testimony of Chet Duffy, Tr., pp. 310 *et seq.;* Don Wright, Tr., pp. 368, *et seq;* Bert Kronmiller, Tr., pp. 386, *et seq.;* Douglas Freeman, Tr., pp. 394, *et seq.;* James Seykora, Tr., pp. 400, *et seq.;* Medicine Crow, Tr., pp. 160, *et seq.*

jurisdiction over non-member hunting and fishing activities within the reservation.[46]

When some complaint was made about non-member intrusion upon tribal or trust properties, the tribal member would generally contact the state game warden who in turn would enforce the law.[47] There were no real problems which arose during this pre-1970 period.

The position taken by the Commissioner of Indian Affairs in 1957 in a letter to the Chairman of the Crow Council appears to state the understanding of all the various parties who exercised some jurisdiction within the Crow Reservation, at least prior to this lawsuit:

> "There is a considerable area of fee-patented land within the reservation owned by non-Indians. We are not aware of any judicial and authority to prohibit non-Indians owning land within a reservation from hunting or fishing such land, par-

[46] This construction of the law is supported by numerous exhibits: Letter from C. E. Lamson, for the Commissioner, to Eli W. Nelson, April 29, 1947, F & G Ex. 4; letter from L. C. Lippert, Superintendent, to Otto Wesley Bear Ground, Tribal Game Warden, dated April 30, 1952, F & G Ex. 5; letter dated October 25, 1923, from Superintendent Asbury to the Commissioner of Indian Affairs; letter dated 1957 from Commissioner of Indian Affairs to Chairman of the Crow Tribal Council, F & G Ex. 115.

Although Appellant and the Tribe rely upon a number of letters and other documents which address hunting and fishing within the Crow Reservation (U.S. Exs. 5-28), these letters and documents all relate to a period of time when Section 2137, Revised Codes, was still law. Section 2137 proscribed hunting in Indian country except for purposes of subsistence. Furthermore, even then the dichotomy between fee and Indian land was recognized. See, e.g., U.S. Ex. 12.

[47] Tr., p. 319.

cularly in the absence of a clearly established exclusive right in the Indian."[48]

While there is a great deal of correspondence between the Tribe and the Department of Fish and Game with regard to opening or closing the entire or parts of the reservation to hunting,[49] there was little or no correspondence until approximately 1973 with regard to fishing. Moreover, in regard to hunting season restrictions or game restrictions, the procedure was for the Tribe to make a request to the Department of Fish and Game to close or restrict hunting or open, as the case may be, and the Commission acting upon that request.[50]

After the enactment of Public Law 86-634,[51] questions developed as to the relative jurisdiction of the Federal Government and the states over fishing and hunting within the reservation. On August 15, 1960, the Field Solicitor in Billings, Montana, rendered his opinion that: "Prosecution under Section 1165 would not appear warranted for hunting or fishing on fee or deed land."[52]

[48] F & G Ex. 115.

[49] See, e.g., memorandum from Starina, to Lewis dated October 14, 1959, closing deer season within the Crow Indian Reservation.

[50] See, e.g., memorandum from Starina, to Lewis dated October 14, 1959, closing deer season within the Crow Indian Reservation; F & G Ex. 8.

[51] Act of July 12, 1960, 74 Stat. 869, 18 U.S.C. 1165.

[52] Letter dated August 15, 1960, from A. E. Bielfeld to Area Director, Indian Affairs, Billings, Montana, F & G Ex. 9a.

From the enactment of P.L. 86-634[53] to the inception of this action and even beyond that period of time, there was solid agreement between the Tribe, the Federal Government, and the State of Montana that 18 U.S.C. Section 1165 controlled hunting and fishing by non-Indians only upon tribal and trust lands but did not extend to non-Indian fee patented land which remained under the exclusive jurisdiction of the state.[54]

Since at least 1928, the State of Montana has engaged in an extensive fish stocking program

[53] "Whoever, without lawful authority or permission, willfully and knowingly goes upon *any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use,* for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited." 18 U.S.C. Section 1165. (Emphasis supplied.)

[54] Letter dated March 13, 1961, Kohler to Lewis, F & G Ex. II; letter dated June 13, 1963, to Weaver, Superintendent of Crow Agency, from Don L. Brown, Fish and Game Department, F & G Ex. 15; letter dated December 9, 1964, to West from Kohler, F & G Ex. 17; office memorandum of Department of and Game dated June 18, 1965, F : G Ex. 19; Fish and Game memorandum dated August 10, 1965, F & G Ex. 20; compare letter of July 22, 1966, from Allan T. Studholme, Bureau of Sport Fisheries, to Regional Director, F & G Ex. 24; Fish and Game memorandum dated October 16, 1966, F & G Ex. 27; Fish and Game memorandum dated May 15, 1973, F & G Ex. 41; letter to Chairman, Crow Tribal Council, from Chairman, Montana Fish and Game, dated February 28, 1975; Resolution No. 253, August 8, 1959, relating to "tribal areas," F & G Ex. 57; compare Cooperative Agreement between the Crow Tribe and Fish and Game, F & G Ex. 58; letter to Ausland from Wright, Fish and Game, dated October 5, 1972, F & G Ex. 97c; letter dated October 19, 1964, from Commissioner of Indian Affairs to John Cragun, attached as an addendum to this brief;

throughout the waters of the Crow Reservation.[55]

In addition, the State Department of Fish and Game has conducted extensive studies on the Big Horn River, and neither the Tribe nor the Bureau of Indian Affairs have objected to such studies. Brown and Rainbow Trout in the Big Horn, Little Horn, and other streams in the reservation were initially introduced by the Department of Fish and Game.[56]

The Department of Fish and Game assumed pervasive control of the Big Horn River because it was navigable and was, therefore, owned by the State of Montana.[57]

The Reservation has become a haven for upland game birds. The Ring-necked Pheasant, Wild Turkey, and Chukkor Partridge with which the reservation is now well-stocked were all introduced

letter dated November 20, 1973, to Chairman, Crow Tribal Council, from Canan, Area Director, Bureau of Indian Affairs, F & G Ex. III:

"It appears that fee status lands even though they are within the exterior boundaries of the reservation, were not included in the coverage of this act. Therefore, the enforcement of Section 1165 on such fee land by Bureau of Indian Affairs or Tribal enforcement officers would not be authorized or prosecuted by the United States Attorneys Office.

"The State of Montana Fish and Game has indicated that they would be glad to meet with the tribal officials to discuss possible closure of fee land on the Reservation to all hunting and fishing and particularly the mountain areas and the areas around Bighorn Lake."

See also testimony of Douglas Freeman, Tr., pp. 405-407.

[55] F & G Ex. 100; literally millions of fish have been planted by the Fish and Game Department. See also exhibits introduced by the Big Horn Rod & Gun Club consisting of newspaper articles from the *Hardin Herald.*

[56] Tr., p. 346.

[57] Tr., pp. 349-350.

by either non-Indians or the Montana Department of Fish and Game.[58] In addition, the Department has stocked game animals in areas adjacent to the reservation, such as Bighorn Sheep, which have migrated onto the tribal mountain areas and have been hunted and killed by Indian hunters.

The tribal historian, Joe Medicine Crow,[59] testified that the Tribe respected fee-patented land and the right of its owner to exclude Indians. The Tribe recognized that within those bundle of rights" which a landowner possessed within the reservation was the right to hunt and fish free from non-state regulations.[60]

The Tribe's historian conceded that when land was ceded to the United States, included within the cession were all constituents of land value "minerals, trees, grassland, and those elements of nature that are perceptible with the five senses* * *fish and game."[61] There was no retention of political control

[58] Tr., p. 351. Rod and Gun Exs. 18, 19, 20, 23, 28, 29, 30, 32, 33, 34, 35, 40, 43, 47, and 54. See also Rod and Gun Exs. 4, 5, 8, 15, 25, 26, 36, 38, 39, 41, 42, 43, 44, 45, 46, 47, 49, 54, 57, 58, 59, 60, and 61, which illustrate that fishing and hunting were being openly pursued within the Crow Reservation without protest from either the Tribe or the BIA. Other articles reflect that the Big Horn Rod and Gun Club requested the Fish and Game Commission to open the Big Horn River for year round fishing and to control goose hutning for conservation reasons. Rod and Gun Exs. 21, 22, and 40 illustrate the common concept prevailing at the time: The mountain area — some 400,000 acres set aside for tribal purposes (Section 1, Crow Allotment Act of 1920)— was closed to hunting by Superintendent Robert Yellowtail. Rod and Gun Ex. 55 reflects that the reservation superintendent felt it was legal to hunt on the reservation.

[59] Tr., p. 352.

[60] Tr., p. 150.

[61] Tr., p. 144.

over the lands ceded.[62]

Since 1872, the Tribe has sent delegations to Washington to negotiate with the United States. These delegations were present prior to passage of the Acts of 1904 and 1920 and the passage of the Yellowtail Dam Act in which their lobbyists were successful in reserving to the tribal members permission "to hunt and fish in and on Yellowtail Reservoir and taking area without a license."[63]

Although the Tribe's historian had searched tribal and court records, he could not find a single instance in which a non-member was prosecuted by any agency, Indian or federal, for hunting or fishing on fee patented land.[64] "I guess, although it doesn't spell it out, the exact bundle or rights that a man acquires after he purchases the land, it is implied that he can hunt and fish or regulate such activities on his own fee land."[65] This is the concept that the Tribe has operated on since 1920.[66]

All land riparian to the Big Horn River below the Yellowtail Dam take area has been allotted, except for 2 or 3 40-acre tracts reserved for recreational purposes.[67] Theoretically, all of that land could be owned by non-Indians.[68]

[62] Tr., p. 144.

[63] Tr., pp. 143, 144, 162-163; F & G Ex. 60, "Joint Resolution," subsection (d).

[64] Tr., p. 160.

[65] Tr., p. 150.

[66] Tr., p. 150.

[67] See Section 5, Crow Allotment Act of 1920, Tr., p. 149.

[68] Tr., pp. 148-149.

D. *Yellowtail Dam—Its Impact upon the Big Horn River Fishery.*

On July 15, 1958, Congress passed Public Law 85-523 providing for the transfer of right-of-way for Yellowtail Dam and Reservoir and payment to the Crow Tribe in connection with the taking.[69] The resolution provided for the payment of $2,500,000.00 to the Tribe but left open the question of:

> "whether an amount additional to that specified in section I hereof is due as just compensation* * *. Nothing contained in this joint resolution shall be taken as an admission on the part of the United States that just compensation is required for any particular element of value, including powersite damsite value, now or hereafter claimed by the Crow Tribe, but the same shall be determined in accordance with the Constitution and laws of the United States.

In *United States* v. *5,677.94 Acres of Land, etc.*, 162 F. Supp. 108 (D.C. Mont., 1958), The United States condemned the land. The question of whether or not the river was navigable was reserved. Subsequently, in the *Crow Tribe of Indians of Montana* v. *The United States of America*, Civil No. 214, the court determined that the river was in fact navigable.

It was the Tribe's position in that suit that the Big Horn River was non-navigable because if the river was non-navigable, then riparian owners, under federal common law, which applied state rules of construction, would own to the middle of the

[69] Joint Resolution dated July 15, 1958, 72 Stat. 361.

stream.[70] If the court had adopted that position, the Tribe's ownership of both the bed and banks of the river would have been guaranteed. The court determined the river was navigable but, in awarding compensation,[71] was not required to determine ownership. Based upon the power value site itself, [72] the court awarded the Tribe the sum of $4,500,000.00 or $2,000,000.00 over the congressional authorization.

In his opinion, Judge Jameson noted that the United States had acquired:

> "the lands for a site for Yellowtail Dam and Reservoir, a multi-purpose dam designed to 'provide for irrigation, flood control, power generation, silt retention, improvement of fish and wildlife resources, recreational opportunities, municipal industrial water and other benefits.''[73]

From at least 1962 on, both the Montana Department of Fish and Game and the United States Department of the Interior, Fish and Wildlife Service represented that among the public benefits flowing from Yellowtail Dam and Reservoir would be the improvement, if not creation, of a new trout fishery.[74] It was represented in each of the various reports promulgated by both Montana and federal agencies that the Big Horn River below the dam would be

[70] See, e.g., *Oklahoma* v. *Texas*, 258 U.S. 579 (1921); *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (19____); *United States* v. *Twin Power Co.*, 350 U.S. 222 (19____); and *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 627-628 (19____).

[71] Court's opinion dated October 1, 1963, the Honorable William J. Jameson.

[72] Section 10, Allotment Act of 1920.

[73] Page 1 of the court's decision dated October 1, 1963.

[74] F & G Exs. 13, 16, 22, 31, 32, 33, 34, 37, and 95.

open to public recreation and fishing and that the State of Montana would commence a program to obtain access to the river itself.

In his report dated January 25, 1966, Clint Bishopt, Distict Fishery Manager for the Department of Fish and Game, stated that the river would be "opened to sport fishing with hook and line the year round. The policy regulations will be to allow the maximum opportunity possible for recreation fishing."[75]

In his memorandum of November 17, 1970, R. W. Burwell, Regional Director, Bureau of Sports Fishery and Wildlife, stated:

> "The Big Horn River trout fishery downstream from Yellowtail Dam is *outstanding* at the present time. It attracts not only Montana fishermen but many from other states. Development of this excellent fishery was predicted in our report of February 5, 1962, on the Yellowtail Unit *and benefits were assigned accordingly.* They were based on the understanding that during the initial years of development, there would be stable flows below the afterbay dam of about 2,500 cfs during the fall and winter months rising to a maximum flow of about 2,000 cfs in August." (Emphasis supplied.)

In the document entitled "Yellowtail Unit, Montana and Wyoming, Fish and Wildlife Resources," published by the United States Department of the Interior, Fish and Wildlife Service, in February, $962,[76] strong emphasis was placed upon the fact

[75] F & G Ex. 22 under the heading "Fishing Regulations in Reservoir and River."

[76] F & G Ex. 95.

that construction of Yellowtail Dam would have a beneficial effect upon the downstream fishery and create a cold-water trout fishery where before none existed. Throughout the report are references to public benefits attributed to improvement of the fishery below the dam, and although access was considered a problem—there being little in the way of fee patented land along the river; nevertheless the clear import of the report pointed to a public fishery—one owned by the State.

Is is noteworthy that the Joint Resolution, Section 2(d), provided: "The members of the Crow Tribe of Indians of Montana shall be *permitted* to hunt and fish in and on the Yellowtail Reservoir and taking area without a license." (Emphasis supplied.) It was quite evident that one of the constituent values "taken" when Congress passed the resolution was any tribal hunting and fishing rights. Otherwise, any reference to survival of those rights would be redundant.

It was approximately 1966 when a recommendation was made by Field Solicitor Bielfeld to the Area Director of Indian Affairs that:

> A well-supported program to develop the resources of the Big Horn River would do much to bullwark the Crows' claim of title to the bed of the river. A do-nothing attitude would suggest that resources are not important to the needs or advancement of the tribe."[77]

It appears that that type of recommendation triggered the Tribal Chairman's letter of October 2, 1970, to Senator Mansfield, advising the senator that the Crow Tribe was "now assuming the

[77] Memorandum dated February 16, 1966, to Area Director from Field Solicitor, F & G Ex. 23.

management of their own reservation fish and wildlife resources" and requesting assistance form the Bureau of Sports Fisheries and Wildlife. This letter was followed by the Bureau's letter to Representative Julia Hansen of November 27, 1970, advising her of the excellent "fishery in the Big Horn River below Yellowtail Dam" and the interests of the Bureau that the fishery "be maintained and extended further downstream." It was in 1970 that the Bureau first formed an agreement with the Tribe for federal assistance in fish and game management. It is noteworthy, however, that in its annual report dated February 2, 1978, the Bureau stated:

> "The Crow Indian Reservation continues to remain closed to non-Indian hunters and fishermen. Since relatively few Crow Indians actively engage in fishing, stocking of reservation waters has been significantly reduced." (Emphasis supplied.)[78]

E. *Patented Fee Lands in the Reservation.*

The State of Montana purchased 2 tracts of land riparian to the Big Horn River "to provide the public with fishing access to the Big Horn River."[79] The land has been part of an allotment, and the patent to Montana's non-Indian predecessor in interest states: "That a fee simple patent issue to the claimant F. M. Heinrich, Purchaser of land included in the allotment of Muskrat," and granted to Heinrich "all the rights,

[78] C.T. Ex. 70a. Although the Bureau reached agreement with the Tribe in 1970, they did not do anything definitive until 1976. The tribal resolution approving the agreement (70-51, C.T. Ex. 70b, Appendix F) stated: "The Crow Tribe is interested in promoting the recreation and fishing use by *non-Indians* of the Big Horn River below Yellowtail Dam." It was shortly after this that the Tribe *closed the reservation to non-Indians.*

[79] Pre-trial Order, Agreed Facts, Record, p. 966.

privileges, immunities, land appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heris and assigns of the said claimant forever.[80]

Other patents to state lands acquired pursuant to the Crow Allotment Act of 1920 included language that the grants were made pursuant to, *inter alia*, the Act of February 22, 1889, admitting the State of Montana to the Union.[81]

State Senator Carroll Graham, a non-Indian rancher and farmer, owned land on both sides of Lodge Grass Creek, a non-navigable stream, within the reservation. His patents contained no restrictions, and he has always operated on the assumption that he had the right, subject to Montana laws, to fish and hunt on his fee patented land, free from federal or tribal restrictions. His land descriptions include the bed of Lodge Grass Creek, and he pays taxes on that land, as well as the rest of his lands.[82] Other ranchers have built reservoirs on their land and stocked them with trout.[83]

[80] Appendix B to Pre-trial Order, Agreed Facts, Tr., p. 966.

[81] See F & G Exs. 70, 71, and 72; cf *Rosebud Sioux Tribe* v. *Kneip*, *supra*, 430 U. S. at 673.

[82] Tr., pp. 282-292.

[83] Tr., pp. 215-216.

* * *

VIII.

THE PRIVILEGE TO FISH AND HUNT IS A RIGHT PROTECTED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. *The Crow Tribal Constitution and By-Laws* [204] *Restrict Membership to Duly Enrolled Members of the Crow Tribe.*

It was the Crow Tribal Council, created by the Crow Constitution, which passed Resolution No. 74-05 on October 13, 1973. There was federal approval to that resolution from James F. Canon, Area Director, Bureau of Indian Affairs.[205] Non-Indians cannot and do not participate in the Crow political process.[206]

B. *The Right to Fish and Hunt is a Property Right.*

Both the Tribe and the United States concede that the right to fish and hunt within the confines of the reservation is a property right.[207] However, whether or not hunting and fishing can be denominated a

[204] Crow Tribe Exhibit 74a.

[205] Letter of November 20, 1973, from James F. Canan to David J. Stewart, Chairman, Crow Tribal Council; Crow Tribe Exhibit 71-r.

[206] Tr., pp. 291-292.

[207] United States brief, p. 48: "The exclusive right of the Tribe is a property right"; Tribe's brief, pp. 49-50; cf. *Menominee Tribe* v. *United States, supra,* 391 U.S. at 413; and *Kimball* v. *Callahan,* 493 F.2d 564 (9th Cir., 1974).

"right" or a "privilege" is immaterial from the standpoint of due process or equal protection. Compare *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971).

C. *Regulation of Hunting and Fishing Rights Must Be Rational, or it Violates Equal Protection Gaurantees.*

Baldwin v. *Montana State Fish ‡ Game Commission*, ___U.S.___, 56 L.Ed. 354 (1978), concluded, in denying Fourth and Fourteenth Amendment challenges, that so long as state regulation or fishing and hunting is "rational," it passes constitutional muster.[208] Surely, Crow legislation dealing wtih the same subject matter must at least meet *Baldwin's* constitutionality standards.

In *Baldwin*, the Supreme Court upheld the constitutionality of a Montana statute which charged non-resident hunters higher fees than it did its resident hunters. Rationality of the legislation in a Fourteenth Amendment setting was confirmed because non-resident hunters create greater enforcement problems.[209] However, in this case, lawful residents of the State of Montana, within whose borders the Crow Reservation is located, who own land on the crow Indian Reservation and thus are also residents of that reservation, are totally precluded from hunting and fishing even on their own land within the reservation. Although the total proscription of hunting and fishing within the reservation was supposedly predicated upon a shortage of fish and game, the record totally fails to support that conclusion. The trial court found that the Crow Tribe

[208] *Id.*, at 370.

[209] *Id.*, at 370.

was not dependent upon fishing as a source of food.[210] Moreover, the record is replete with evidence that upland game birds, deer, elk, and big horn sheep flourish on the reservation because of Montana's fish and game conservation and planting programs. Unlike the situation in *Baldwin*, where the record proved that the elk were basically situated in Montana and thus Montana had a parochial interest in maintaining the number of that natural resource in Montana, the tribal elk herd ranges into Montana and Wyoming and spends most of the summer in off-reservation feeding areas.[211]

As has already been reflected upon at page 6-8 of this brief, the United States, in treating with the Crow, did not preserve Crow sovereignty nor did it create any Crow sovereignty over non-Indians. To that extent, following the teaching of *Oliphant*, the Tribe's right to regulate non-Indian activity on non-Indian land was implicitly divested.[212]

As reflected upon above, non-members are not permitted to vote in tribal elections or at tribal council meetings. Yet the resolution is a legislative act of the Tribal Council that purports to divest non-members of their property rights. Under traditional constitutional concepts, such action is proscribed by

[210] That finding is conclusive in this court unless clearly erroneous. *Beaver* v. *United States*, 350 F.2d 4, 7 (9th Cir., 1965).

[211] See "FACTS," *infra*.

[212] See, e.g., *United States* v. *Wheeler*, ___U.S.___, 55 L.Ed.2d 303 (1978); *Oliphant* v. *Suquamish Indian Tribe*, ___U.S.___, 55 L.E.d.2d 209 (1978).

the due process and/or equal protection guarantees of the Fifth Amendment.[213]

The unique relationship which preserved the employment preference in *Morton* v. *Mancari, supra,* obviously does not cover the blanket discrimination against non-members involved in this case. While in *Finch, supra,* 548 F.2d at 835, this court held that the reasons for "sustaining the statute specially applicable to the Indians in that case is equally applicable to the tribal ordinance at issue here," the analogy is not apt. In *Mancari* and *Moe*, nothing was taken from non-Indians. Rather, the court approved a super preference for employment in the Bureau of Indian Affairs in *Mancari* and in *Moe* upheld an Indian exemption from state taxation.

In this case, the Tribe has divested non-Indians' property rights which were conveyed to them by the United States.[214] The Indians possess or have the beneficial use of purchase money but are preventing full enjoyment of what they sold based upon purely specious reasons without record support.

The Supreme Court has declared unconstitutional state and territorial legislation which discriminated between citizens and non-citizens of the state or territory. *Toomer* v. *Witsell*, 334 U.S. 385 (1948); and *Mullaney* v. *Anderson*, 342 U.S. (1952). It has also struck down legislation which totally proscribed non-

[213] *Kramer* v. *Union Free School District*, 394 U.S. 621 (1969); *Cipriano* v. *City of Huoma*, 395 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); and cf. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964).

[214] In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 544-546 (1972), the Supreme Court emphatically stated that the Fourteenth Amendment includes within the scope of its protection property rights. Fourteenth Amendement protections are embraced within the Fifth. See pp. 33-37, *infra.*

citizens from obtaining commercial fishing licenses as violating the Fourteenth Amendment. *Takihashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948). In *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, the court struck down discriminating state legislation and said: "[a] statute that leaves a state's residents free to destroy a natural resource while excluding aliens or non-residents is not a conservation law at all."[215] Guided by these precedents, the tribal resolution cannot pass constitutional muster and must be declared unconstitutional.

IX.

THE TOTAL PROSCRIPTION AGAINST NON-MEMBER HUNTING AND FISHING WITHIN THE CROW RESERVATION VIOLATES THE INDIAN CIVIL RIGHTS ACT

Since the Supreme Court decided *Oliphant, supra*, and *Santa Clara Pueblo* v. *Martinez*, ____u.s.____, 56 L.Ed.2d 106 (1978), it is questionable whether the Indian Civil Rights Act includes within its ambit non-Indians. Certainly, the congressional history of that act does not indicate it was to include non-Indians. A portion of the legislative history of the Indian Civil Rights Act is contained in F & G Exs. 101(a) through 101(i). Throughout the congressional hearings on the Indian Civil Rights Act, it was evident that the focal point of congressional interest was the deprivation of Indian civil rights by other Indians. At no time did the committee express any concern over protecting the rights of non-Indians on reservations.

[215] 431 U.S. at 285, n. 21.

However, Section 1302 of the Act provides that:

> "No Indian tribe in exercising powers of self-government shal * * * (5) take any private property for a public use without just compensation; * * *
>
> (8) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;" (Emphasis supplied.)

Courts have held that this section applies equally to non-Indians. *Dry Creek Lodge, Inc.* v. *U. S. C.*, 515 F.2d 926 (C.A. 10th, 1975).

If we utilize the equal protection standard established by the Supreme Court vis-a-vis hunting rights in *Baldwin, supra,* it is self-evident that the Crow Resolution No. 74-05 does not pass constitutional muster. The Tribe and the United States made absolutely no attempt to support the total proscription of non-Indan hunting and fishing on any rational basis. There also was no attempt by the Tribe to show that "equal protection" under its constitution did not track Anglo Saxon standards.[216] Nor did it attempt to prove that its tribal, cultural or ethnic survival would suffer from full-scale enforcement of the equal protection guaranty afforded by Section 1302(8).[217]

[216] Cf. *Howlett* v. *Salish & Kootenai Tribes,* 529 F.2d 233 (9th Cir., 1976).

[217] Cf. *Martinez* v. *Santa Clara Pueblo,* 540 F.2d 1039, rev'd on other grounds ____U.S.____, 56 L.Ed.2d 106 (1978). The question of sovereign immunity and federal jurisdiction is not an issue in this case because both the Tribe and the United States seek to have this court declare that the Tribe's exercise of political jurisdiction is proper. See also *Trans-Canada Enterprises, Ltd.* v. *Muckleshoot Indian Tribe,* Civil No. C-77-882-M (W.D.Wash., 1978).

If the Indian Civil Rights Act is applicable to non-Indians, then it is obvious that Resolution No. 74-05 deprives non-Indians of due process and equal protection. Of course, if non-Indians do not come within the ambit of I.C.R.A. protection, then it is most important that this court manifest "great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[218]

X.

THE TRIBE DOES NOT HAVE POLICE POWER JURISDICTION TO ENFORCE RESOLUTION 74-05 AGAINST NON-INDIANS ON NON-INDIAN LAND WITHIN THE RESERVATION

Regulation of fishing and hunting is peculiarly within the police power of a state. *Baldwin* v. *Montana Fish & Game Commission*, ____U.S.____, 56 L.Ed.2d 354, 370 (1978). The term "police power" is but a convenient summarization of the power inherent in a sovereignty[219] to perform adequately all the requisite functions of a civilized government.[220] It has been said that the police power has been left to the states.[221] This points up the fact that although the United States Constitution delimits the police power,

[218] *Oliphant, supra*, 55 L.Ed.2d at 222.

[219] *Barbier* v. *Connolly*, 113 U.S. 27 (1885); *Lake Shore E. M.S. Ry. Co.* v. *Smith*, 173 U.S. 285, 294 (1899); *Nebbia* v. *New York*, 291 U.S. 502, 523-524 (1934).

[220] *The Mayor of the City of New York* v. *Milno*, 11 Pet. 102 (1837).

[221] *Keller* v. *United States*, 213 U.S. 138 (1909); *Hammer* v. *Dagenhort*, 247 U.S. 251 (1918).

none of its provisions created it, nor were any constitutional provisions specifically intended or designed to interfere with or to cripple the police power of the various states.[222]

In the United States, there are only two sovereigns.[223] Therefore, in the face of the fact that tribal jurisdiction over non-members was both explicitly and implicitly divested,[224] the attempted exercise of police power by the Tribe through enactment of Resolution No. 74-05 and other ordinances is anachronistic and invalid.

XI.

THE STATE OF MONTANA HAS AUTHORITY TO REGULATE NON-INDIAN ACTIVITY WITHIN THE RESERVATION

Although the United States and the Tribe argue that the lower court did not have jurisdiction to decide the extent of Montana's jurisdiction over non-Indian fishing and hunting activities within the reservation, it is obvious that issue was not only subsumed within the United States' contentions,[225] but also is the obverse question presented by the United States' and the Tribe's assertion of sole

[222] *The Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819); *Butchers' Union Co.* v. *Crescent City Co.*, 111 ELSL 746 (1884); *Holden* v. *Hardy*, 169 U.S. 336 (1898).

[223] *Oliphant, supra; United States* v. *Kagama, supra.*

[224] *United States* v. *Wheeler, supra.*

[225] See p. 3 of this brief.

authority to regulate.[226] It is obvious that the states' right to regulate is an issue "raised in the context of a live controversy between parties with adverse interests."[227]

Both this court and the Supreme Court have held that a state has legitimate interests to protect when it reguates non-Indian activities within a reservation.[228] Those interests include regulating non-Indian hunting and fishing activities within an Indian reservation. The lower court's decision on the states' authority to regulate should be affirmed.

In *Draper* v. *United States,* supra, footnote 171, the Supreme Court articulated the principles upon which state jurisdiction attaches to non-Indan activities within the Crow Reservation. *Oliphant, supra,* fully extends the reasoning of *Draper* by eliminating any vestiges of Indian criminal jurisdiction over non-Indians. The United States has partially bridged the jurisdictional hiatus of regulating non-Indian hunting and fishing activity on Indian lands. However, that jurisdiction is only partial. Therefore, the State must complete the regulatory process. This dichotomy of jurisdiction over non-Indians has worked well in the past, and there is no reason to believe it will not continue to operate

[226] The United States' complaint and contentions contained in the pretrial order, insofar as state regulation is concerned, clearly satisfy the "case or controversy" test established in *Aetna Life Ins. Co. of Hartford* v. *Haworth,* 300 U.S. 227 (1937); and *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1951), Justice Frankfunter concurring.

[227] *Moore's Federal Practice,* 2nd Edition, Section 57.11, pp. 57-98.

[228] *United States* v. *Sanford,* 547 F.2d 1085, 1089 (1976) *Moe* v. *Confederated Salish & Kootenai Tribes, supra;* cf. *Oliphant, supra,* and *Puyallup III, supra.* See also *Draper* v. *United States,* ____U.S.____. 17 S.Ct. 107 (1896).

smoothly as long as the Tribe recognizes its jurisdictional limitations.

Tribal jurisdiction can impose no sanctions on non-Indians; therefore, the State must, just as it has in the past, fully regulate a non-Indian's hunting and fishing activities on the reservation.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decision of the district court should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of December, 1978.

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CERTIFICATE OF SERVICE BY MAILING

I, Urban L. Roth, one of the attorneys for the Ap-

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